



**POWBRIDGE**

Bridging the gap between legislation  
and practice in the posting of workers



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**Bridging the gap between legislation and practice in the posting of  
workers  
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**Bridging the gap between legislation and practice in the posting of  
workers:  
Austria Country Report**

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## Executive Summary

The Austrian case study investigates how the Posting of Workers Directive and other EU regulations interplay with Austrian rules and regulations on social security, health insurance, temporary agency work, and company law. The study identifies gaps between procedures (legal basis) and practices (experiences) in posting rule enactments. Other case studies cover Slovenia, Italy, Slovakia, Hungary, Poland, Serbia and North Macedonia.

**The methodology** combines data analysis of documents, statistical and interview data. Documents under study include rights and obligations of posted workers, cross-border mobile workers, posting companies, etc. Interview data stem from the viewpoint of both public authorities, social partners as well as employers and employer representatives. Semi-structured interviews use a vignette design to elicit insights from both viewpoints on posting practices. The empirical data analysis follows qualitative thematic analysis that organizes and compares different interview responses by topic to create a comprehensive picture of the situation and perceived challenges. **The analytical framework** identifies national legislation, policy measures, government instructions and related regulations in various domains pertaining to posting and cross-border labour mobility.

Posting foreign workers to Austria is a common practice. Posting rates show that Austria ranked fifth in the EU after Germany, France, Belgium, and Netherlands for received postings in 2018. Germany, Slovenia, Slovakia and Hungary were the main sending countries to Austria.

**Results** show that 1) The **Austrian regulatory framework** and especially the Act to Anti-Wage and Social Dumping seem comprehensive and sometimes stricter than the European Posting of Workers Directive and its Enforcement, especially with respect to labour law, administrative requirements, and fines. Whereas public officials and social partners applaud this law as a means of fighting social fraud, affected posting companies and their representatives see this as overburdening bureaucracy to hinder the freedom of providing services. Some sought legal battles until the Court of Justice of the European Union overturned the Austrian legislation through the ruling “Maksimovic and Others”. This means that administrative fines can no longer be cumulative, disproportionate to the violation, or result in prison sentences. 2) **Regulatory enforcement** within and across borders was identified as deficient by public stakeholders and social partners. In particular, social insurance regulations are difficult to enforce across borders. Because the origin country is responsible for social insurance, social insurance regulations for foreign posting companies are not covered by Austrian law. A continuum exists from legal to illegal practices: Some companies may reduce their social insurance costs by paying only the minimum-wage level of the sending country, or by obtaining insurance documents by only paying part-time, just for a few days or not at all. Sending and receiving social insurance institutions do not always share their information and cooperate in a timely manner. The Electronic Exchange of Social Security Information is not fully functional yet. 3) **Employers** find that if they strictly follow all rules and regulations, they are faced with added costs: Legal services, document keeping, tax services, housing costs etc, which is cutting into savings and impedes freedom of service provision. Employers find the Austrian regulations overly bureaucratic, surpassing the EU directives and also surpassing the requirements for domestic companies. They, therefore, call for reducing this burden. For reasons of saving time and resources, public authorities find that employers may circumvent regulations. Public

authorities find that employers may have an incentive to violate administrative regulations such as document keeping, as those are considered less severe than social fraud and now result in lower fines. 4) **Worker protection** continues to be improved towards “equal work, equal, pay, equal conditions.” Language difficulties and limited access to information still remain challenges in supporting posted workers and, therefore, deserve policy attention and the introduction of new tools.

**Recommendations** are made at five levels: **1. EU level:** Strengthen the European Labour Authority; improve the Internal Market Information System; speed up the implementation of the Electronic Exchange of Social Security Information; consider European social insurance chip cards (real-time registry); and implement Social Progress Protocol. **2. National level (Austria):** Extend competency of investigation to all relevant agencies; adjust the Act to Anti-Wage and Social Dumping to reflect the amended PWD and court rulings; provide a platform to upload documents electronically; support posting companies in finding the correct collective agreements; reduce bureaucracy; and reduce incentives for wage and social dumping. **3. National level (sending country):** Deploy social attachés for posted workers; and support national social insurance agencies to issue A1 portable documents faster. **4. Social partners:** Continue to offer information in the workers’ native languages; offer union membership to posted workers, use translators; and **encourage EU citizens** to also consider working for Austrian companies. 5. Lastly, foreign **employers** may need to ensure compliance, e.g. by working with accounting and law agencies or find other ways. With respect to domestic companies, they may support foreign companies, Temporary Work Agencies, or subcontractors in being compliant.

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# 1 Introduction

The Austrian case study investigates how the Posting of Workers Directive and other EU regulations interplay with national rules and regulations on social security, health insurance, temporary agency work, and company law. Country case studies identify gaps between procedures (legal basis) and practices (experiences) in posting rule enactments in Austria, Slovenia, Italy, Slovakia, Hungary, Poland, Serbia and North Macedonia. This particular case study focuses on Austria, in particular on sending companies and temporary employment agencies to Austria as the host country.

The **methodology** combines secondary and empirical data. Secondary national data are based on a literature review and statistics. Interview data were collected in each country to assess the impact of different regulations on actual practices. The method used for the primary data collection was based on semi-structured interviews with posting employers and representatives of public authorities and social partners in each country. A particular feature of the qualitative interviews is the use of vignettes to elicit insights from both sides of the institutional relationship: posting employers and street-level bureaucrats/state agency representatives on posting practices.

**Results** show that the **Austrian regulatory framework** and especially the Act to Anti-Wage and Social Dumping (LSD-BG) seem comprehensive and sometimes stricter than the European Posting of Workers Directive and its Enforcement, especially with respect to labour law, administrative requirements, and fines. Whereas public officials and social partners applaud this law as a means of fighting social fraud, affected posting companies and their representatives see this as overburdening bureaucracy to hinder the freedom of providing services. Some sought legal battles until the CJEU overturned the Austrian legislation through the ruling “Maksimovic and Others”. This means that administrative fines can no longer be cumulative, disproportionate to the violation, and result in prison sentences.

**Regulatory enforcement** within and across borders was identified as deficient by public stakeholders and social partners. In particular, social insurance regulations are difficult to enforce across borders. Because the origin country is responsible for social insurance, social insurance regulations for foreign posting companies are not covered by Austrian law. A continuum exists from legal to illegal practices: Some companies may reduce their social insurance costs by paying only the minimum-wage level of the sending country, or by obtaining insurance documents by only paying part-time, just for a few days or not at all. Sending and receiving social insurance institutions do not always share their information and cooperate in a timely manner. The Electronic Exchange of Social Security Information is not fully functional yet.

**Employers** find that if they strictly follow all rules and regulations, they are faced with added costs: Legal services, document keeping, tax services, housing costs, etc, which is cutting into savings and impedes freedom of service provision. Employers find the Austrian regulations overly bureaucratic, surpassing the EU directives and also surpassing the requirements for domestic companies. They therefore call for reducing this burden. For reasons of saving time and resources, public authorities find that employers may circumvent regulations. Public authorities find that employers may have an incentive to violate administrative regulations such

as document keeping, as those are considered less severe than social fraud and now result in lower fines.

Findings also show that **worker protection** continues to be improved towards “equal work, equal, pay, equal conditions.” Language difficulties and limited access to information still remain challenges in supporting posted workers and, therefore, deserve policy attention and the introduction of new tools.

The **structure** of this report is as follows: The introduction (chapter 1) is followed by the country context (chapter 2) with a socio-economic overview as well as labour mobility and posting rates and trends. The methodology (chapter 3) covers the data collection (document review and stakeholder interviews), data analysis and analytic framework. The results (chapter 4) present findings regarding the regulatory framework, national implementation and enforcement, employer practices and challenges, worker protection. The conclusion (chapter 5) is followed by policy recommendations (chapter 6) organized by stakeholder groups.



## 2 Country Context

### 2.1 Socio-economic overview

Since 2014, the GDP grew in Austria at least three percent per year (3.2% in 2019).<sup>1</sup> The overall employment rate among people aged 15 to 64 was 73.3% in 2019, which has been steadily rising since 2014, when it was at 66.5%.<sup>2</sup> Employment rates in 2019 among men were 78.0%, and 69.2% among women.

Unemployment in Austria in 2019 was 4.5% for persons aged 15 to 64. For women (4.4%), the unemployment rate was slightly lower than for men (4.6%).<sup>3</sup> 2019 had a quota of open jobs of 3.0%.<sup>4</sup> There was an average of 128,200 open jobs in 2019, mainly in the service industry (21.4%) and skilled trade (21.6%).<sup>5</sup> This is an increase of more than 200 percent from 2014, where an average of 62,400 jobs were open. Open jobs requiring a skilled trade was much lower in 2014, amounting to 8,800 jobs compared to 2019 of 27,600 jobs. This could denote that Austria has developed a shortage of skilled, Austrian-based craftsmen. This was also suggested by an interviewed employer having observed the trade profession over the past decades.

Table 1: Overall labour market dynamics

	2017	2018	2019
<b>GDP real (annual growth in %)</b>	3.3%	4.3%	3.2%
<b>Employment rate, population aged 15+ (%)</b>	72.2%	73.0%	73.6%
<b>Job vacancy (in 1.000)</b>	97.4	120.3	128.2
<b>Job vacancy (in %)</b>	2.4%	2.9%	3.0%
<b>Unemployment rate, population aged 15+ (%)</b>	5.5%	4.9%	4.5%
<b>Average annual (monthly) gross wage (in EUR)</b>	49,966 (4,164)	51,130 (4,260)	52,559 (4,380)
<b>Monthly gross minimum wage (in EUR)</b>	1,500 starting 2020 (21,000 per year) <sup>6</sup>		

Sources: Statistics Austria, OECD.

The average monthly gross wage in Austria was €4,260 in 2019<sup>7</sup>, compared to the Slovak Republic of €1,086 or Slovenia with €1,813 (OECD Data).<sup>8</sup> This wage differential is one reason why posting to Austria is attractive, despite the fact that the same pay is legislated for workers posted to Austria. While the minimum monthly income is €1,500 starting in 2020, the collective agreements such as for skilled construction workers are significantly higher, with a minimum wage of more than €2,400 per month.<sup>9</sup>

<sup>1</sup> Statistik Austria, GDP, retrieved December 18, 2020, from [https://www.statistik.at/web\\_en/statistics/Economy/national\\_accounts/gross\\_domestic\\_product/annual\\_data](https://www.statistik.at/web_en/statistics/Economy/national_accounts/gross_domestic_product/annual_data)

<sup>2</sup> Statistik Austria, Employed, retrieved December 18, 2020, from [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/arbeitsmarkt/erwerbstaetige](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/arbeitsmarkt/erwerbstaetige)

<sup>3</sup> Statistik Austria, Unemployed, retrieved December 18, 2020, from [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/arbeitsmarkt/arbeitslose\\_arbeitssuchende](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/arbeitsmarkt/arbeitslose_arbeitssuchende)

<sup>4</sup> Statistik Austria, Open Jobs, retrieved December 18, 2020, from [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/arbeitsmarkt/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/arbeitsmarkt/index.html)

<sup>5</sup> Statistik Austria, Job vacancies, retrieved December 18, 2020, from [https://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/arbeitsmarkt/offene\\_stellen/index.html](https://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/arbeitsmarkt/offene_stellen/index.html)

<sup>6</sup> Eurofound, retrieved December 18, 2020, from <https://www.eurofound.europa.eu/publications/article/2017/austria-social-partners-agree-on-eu1500-monthly-minimum-wage-for-all-sectors>

<sup>7</sup> Statistik Austria, Annual income, retrieved December 18, 2020, from [http://www.statistik.at/web\\_de/statistiken/menschen\\_und\\_gesellschaft/soziales/personen-einkommen](http://www.statistik.at/web_de/statistiken/menschen_und_gesellschaft/soziales/personen-einkommen)

<sup>8</sup> OECD. Average wages, retrieved December 18, 2020, from <https://data.oecd.org/earnwage/average-wages.htm>

<sup>9</sup> Entsendeplattform, retrieved December 18, 2020, from <https://www.entsendeplattform.at/kv/Z04/bauindustrie-und-baugewerbe-zkv-baulose-en-arb/construction-industry-and-building-trades-brief-overview/388925?language=en>

## 2.2 Labour mobility and posting rates and trends

Austria has been one of the main receiving countries for posted workers in Europe. 119,907 Portable Documents A1 (PDs A1) were issued for posted workers coming to Austria in 2018, making Austria ranked fifth in the EU after Germany, France, Belgium, and Netherlands (De Wispelaere et al, 2019).<sup>10</sup> Germany, Slovenia, Slovakia, and Hungary were the main sending countries. Austria ranked highest in terms of postings received from neighbouring Member States, which underscore the importance of geographical proximity in the posting business.

Table 2: General labour migration and posting trends in the last three years available

	2016	2017	2018
Total number of emigrants	64,428	66,144	67,212
Total number of immigrants	129,509	111,801	105,633
Total EU migrants received	64,699	64,353	65,327
Total TCN migrants received	54,472	37,303	30,553
Share of immigrants of working age (19-65 years old) in %	n/a	n/a	74,90%
Total number of outgoing posted workers <sup>11</sup>	75,132	68,956	110,687
Total number of incoming posted workers	120,150	141,046	119,907
Labour market share of incoming posted workers	2.8%	1.2%	2.0%
Main countries of destination for posted workers	DE, CH, IT, FR	DE, CH, IT, FR	DE, IT, CH, FR
Main countries of origin of posted workers received	DE, SI, SK, HU	SI, DE, HU, SK	DE, SI, SK, HU

Sources: Eurostat (<https://ec.europa.eu/eurostat>), De Wispelaere et al, 2019. De Wispelaere & Pacolet, 2018. De Wispelaere & Pacolet, 2017.

From a sending perspective, 110,687 PDs A1 were issued in Austria for outgoing workers in 2018 (De Wispelaere et al, 2019). Posting from Austria primarily occurred to Germany, Italy, Switzerland and France. The share of persons falling under Article 12 of the Basic Regulation in national employment was 2.0% for Austria in 2018, which is higher than the European average of 0.8% (De Wispelaere et al, 2019).

Construction is the sector employing the most posted workers in Austria from a sending and receiving perspective. From a sending perspective, 45.6% of PDs A1 (Article 12) were issued to Austrian workers posted to other countries in 2018 (De Wispelaere et al, 2019), and about 64.3% of PDs A1 (Article 12) were issued to Austria's construction sites in 2017 (De Wispelaere & Pacolet, 2018). The real share of construction is likely to be even higher, because employers in construction may circumvent to pay contributions to the Construction Workers' Annual Leave and Severance Pay Fund (Danaj et al, 2020). Although posted workers accounted for merely 1.2% of the Austrian labour force, they accounted for an estimated 21% of total employment in construction in 2017 (De Wispelaere et al, 2018).

<sup>10</sup> Please note that a person might be issued multiple PDs A1 during one year so the total number of individual posted workers will be lower.

<sup>11</sup> De Wispelaere et al, 2019. De Wispelaere & Pacolet, 2018. De Wispelaere & Pacolet, 2017.

### 3 Methodology

#### 3.1 Data collection

The methodology uses a mixed methods approach combining secondary and empirical data collection and analysis: 1) Secondary data are based on a literature review and national statistics. The analytical framework identifies national legislation, policy measures, government instructions and related regulations in various domains pertaining to posting and cross-border labour mobility. Documents under study include rights and obligations of posted workers, cross-border mobile workers, posting companies, etc. 2) Empirical data are gathered from the viewpoint of both employers as well as public authorities and social partners.

Semi-structured interviews use a vignette design to elicit insights from both viewpoints on posting practices. Vignettes aim to identify the gap between formal arrangements (legislation) and actual practice in the context of posting. Vignettes have been used in various fields of social research with both a quantitative and qualitative orientation to contextualize issues in question (Jenkins et al, 2010; Sampson and Johannessen, 2019). The vignettes help explore and understand how the interplay between different legal regulations impacts on employers' practices and their decision to engage in posting, and their specific strategies to manage complex regulation. The vignettes comprise of short cases describing a specific, realistic situation to the relevant regulation (e.g. work accident or working overtime). The interviewee can reflect on plausible connections between regulation and practical decision-making, including potentially sensitive matters (Sampson and Johannessen, 2019; Svendsen, 2016).

The data analysis utilizes a mixed-methods approach combining qualitative data sources with secondary data. The interview analysis follows the qualitative thematic analysis (Guest et al, 2012) that thematically organizes and compares different interview responses to create a comprehensive picture of the situation and perceived challenges. In an iterative effort, the different data interview responses were thematically organized with the help of qualitative data analysis software and then compared with each other in order to create a comprehensive picture of the situation in question and of the perceived challenges.

The following public and private-sector stakeholders were interviewed between July and November 2020:

*Table 3: Interviewee by stakeholder group*

	Stakeholder group	Date
	Public officials or social partners	
1	Chamber of Labour	8 July 2020
2	Construction Workers' Annual Leave and Severance Pay Fund (Posting expert)	17 July 2020
3	Construction Workers' Annual Leave and Severance Pay Fund (Construction site inspector)	20 July 2020
4	Labour Inspectorate	16 July 2020
5	Union for Construction & Wood	22 July 2020
6	Financial Police	15 July 2020
	Employer-related stakeholders	
7	Chamber of Commerce (Construction expert)	10 August 2020
8	Attorney at law (Posting expert for multinational companies)	18 August 2020

9	Employer in construction-related business	7 September 2020
10	Chamber of Commerce (Advisor)	6 October 2020
11	Employer posting from Slovenia to Austria (construction-related)	4 November 2020
12	Employer posting from Slovenia to Austria (construction)	11 November 2020
13	German Trade Chamber in Austria	4 November 2020

We ensured the confidentiality and anonymity of the information provided by using either a hard-copy or an online consent form, aligned with General Data Protection Regulations guidelines. Interviews were either conducted on site, via telephone or via an online conference tool (Zoom). Interviews were recorded with a voice recorder or directly in Zoom and they were saved on the protected data repository at the European Centre, and not on an external cloud to ensure data protection protocols.

### 3.2 Analytic Framework

The analytical framework comprises the identification of the national legislation, policy measures, government instructions and related regulations in various domains pertaining to posting, cross-border labour mobility, temporary agency work, social security, health insurance, company law and any other relevant regulation. Documents under study included rights and obligations of posted workers, of cross-border mobile workers, and of posting companies, as well as conditions for and incentives of cross-border service provision.

An important data source were rulings by the Court of Justice of the European Union (CJEU). Several interviewees referred to cases that were deferred to the CJEU, in particular the CJEU ruling (Maksimovic and Others)<sup>12</sup> against Austrian regulations in 2019. The consequences of this and other rulings are not fully clear yet, but they seem to have major implications for practices in Austria and other EU countries.

### 3.3 Challenges and limitations

One major challenge of this study was that the field work took place during the Covid-19 pandemic. When interviews were conducted on site, we followed COVID-19 precautions such as wearing masks, keeping a distance of 2 metres, using glass screens, and open windows. As a result, the recording quality was sometimes low, because of the street noise due to the open windows. Therefore, the interview transcription was sometimes difficult, which had to be complemented with personal notes.

Another major challenge was the recruitment of private-sector stakeholders. Contacts to public sector and social partners were relatively easy to establish, and we were able to cover the different actors across the involved institutions such as Chamber of Labour, Unions, Financial Police and Construction Workers' Annual Leave and Severance Pay Fund. However, it took more time and effort to recruit posting employers or temporary work agencies. Reasons mentioned were capacity limitations, no interest in this kind of research, and possibly fear about uneasy questions. As a result, we contacted stakeholders who worked with employers such as

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<sup>12</sup> Judgment of the Court on 12 September 2019 (ECLI:EU:C:2019:723) in the proceedings Zoran Maksimovic and Others, retrieved December 18, 2020 from <http://curia.europa.eu/juris/document/document.jsf?text=&docid=217671&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=10498232>

lawyers or representatives of the Chambers of Commerce, who were able to provide us with the standpoint of private sector companies and complement the viewpoints provided by the three employers we managed to interview. Further research into temporary work agencies that post workers is necessary.

Limitations concern the limited generalizability of interview data. Because we most often interviewed one person per stakeholder group, we can only represent the position and viewpoint of that individual, but not necessarily of the whole institution. The reader, therefore, needs to put statements and direct quotes into perspective.

## 4 Results

### 4.1 Regulatory Framework

In this part of the report, we discuss the rules and regulations relevant to the posting of workers in Austria and answer the following question: How does the implementation of the Posting of Workers Directive (PWD) interact with national regulations related to posting such as the rules on social security, health insurance, temporary agency work and company law?

The PWD and subsequent directives such as the Enforcement Directive and the amended PWD target the reduction of wage and social dumping, which is typically understood as when “foreign or local companies employ their workers at conditions inferior to those laid down in the host country’s employment regulations or collective agreements” (Bernaciak, 2012). According to these directives and Austrian Law, the offered wages and benefits should not differ between Austrian and posted workers. Taking preventive measures for protecting its national labour market, Austria passed an anti-dumping legislation in 2011 to enforce the equal pay principle on companies, both foreign and domestic (Danaj et al, 2020). Despite the implementation of national regulation, previous research suggests wage and social dumping may still occur at several levels. According to Schmatz and Wetzel (2014), in the case of construction this often concerns incorrect application of wage and special payment (levels) and working hours.

In addition to legislation, Austria has a long-standing tradition of strong cooperation with social partners. Based on negotiations among social partners, collective agreements at the industry level play a central role in Austria. For example, the Austrian construction industry is governed by 19 different collective agreements (Danaj et al, 2020). These include definitions of occupations and tasks (e.g. apprenticeship, unskilled work, skilled work), minimum wage (hourly and monthly) to be paid for each category, holiday pay levels and overtime rules.

#### 4.1.1 Posting and cross-border labour mobility

The requirements of posting workers and the associated legal implications are contained in several Austrian laws.<sup>13</sup>

The **Austrian Act to Anti-Wage and Social Dumping** (Lohn- und Sozialdumping-Bekämpfungsgesetz, LSD-BG<sup>14</sup>) has been the main law concerning posting after being adopted in January 2017. As a law in its own standing, the LSD-BG combined into one law the wage and social dumping provisions, which became part of the Austrian Law Amending the Labour Contract Law in 2011 (LSDB-G of the Arbeitsvertragsrechts-Anpassungsgesetz, AVRAG), and the Austrian Personnel Leasing Act (Arbeitskräfteüberlassungsgesetz, AÜG). The AVRAG had been passed before the European posting directives and combined disparate labour topics, so the LSD-BG brought forward a more comprehensive legislation on posting issues. LSD-BG increased the scope for workers including temporary workers, required reporting to the Central Coordinating Agency prior to any posting, and introduced some changes to record keeping. The LSD-BG effectively transposed the Posting of Workers’ Directive 96/71/EC (PWD), which laid down a general regulatory framework for general minimum requirements that are subject to

<sup>13</sup> See a comprehensive list of laws under the Posting of workers platform, retrieved December 18, 2020, from [https://www.entsendeplattform.at/cms/Z04/Z04\\_10\\_999.8/legal-framework](https://www.entsendeplattform.at/cms/Z04/Z04_10_999.8/legal-framework). See also the referenced Austrian law under the references of this report.

<sup>14</sup> All references to laws and directives can be found in the reference section at the end.

terms and conditions of private-sector employment enforced in the posted workers' host country. This means, for example, minimum rates of pay or the host country's health and safety at work regulations apply (Article 3). The implementation of this directive resulted in large differences among EU countries. Therefore, the Enforcement Directive 2014/67/EU further addressed uniform implementation and enforcement of cross-border mobility including prevention of abuse and circumvention by administrative cooperation, which is also reflected in the LSD-BG.

Interpreted positively, the LSD-BG is considered as one of the most comprehensive anti-dumping legislations in the European Union (Krings, 2019). Expressed negatively, the LSD-BG transgresses the EU regulatory framework and, therefore, reduces the freedom to provide services, as employer representatives we interviewed find.

The LSD-BG explicitly states that it shall “apply to workers posted to perform work in Austria or hired out on a cross-border basis” (sec1.4), thus it includes cross-border enforcement. The LSD-BG includes the following areas:

- *Minimum remuneration:* Workers posted or hired out in Austria shall “be mandatorily entitled to at least the remuneration determined by law, ordinance or collective agreement” (sec3.3). This also includes special payments.
- *Annual leave entitlement:* Posted and hired-out workers have a mandatory entitlement to paid annual leave (sec4.1).
- *Entitlement to compliance with working hours and rest periods:* Maximum working times and minimum rest periods (plus those stated in collective agreements) also apply to posted and hired-out workers (sec5).
- *Provisions governing the posting and hiring out of workers on a cross-border basis:* These include continued remuneration in the event of illness or accident, termination entitlements, public holidays, etc (sec6).

**Document keeping.** Employers and temporary work agencies need to report the employment of their workers to the Central Coordination Agency prior to commencement of work. The employers need to keep readily available on site the following documents: reporting documents, social security documents and official permits (LSD-BG, sec21), wage or salary documents such as the employment contract or state and terms of conditions (Dienstzettel), the payslip, proof of wage payment such as bank transfer, and records of hours worked (sec22).

**Fines for violating reporting obligations.** Specifying the equal payment rule and equal treatment of domestic and posted workers, the LSD-BG aims at facilitating the enforcement of anti-wage-dumping in a preventative way. LSD-BG specifies penalty fees ranging from €1,000 to €10,000 for each worker and from €2,000 to €20,000 in case of offence repetition, for omitting notifications of postings to the Austrian authorities, for providing incorrect data in the reports, failing to keep the required documents readily available (LSD-BG, sec26). The fines can be cumulated and there is no upper limit. If the fines are not paid, employers may face a prison sentence.

However, the 2019 CJEU ruling (Maksimovic and Others) against Austrian regulations concluded that high, cumulative fines are disproportionate to the violation and cannot be imposed by national legislation, because it hinders the freedom to provide services (see Box 1).

**Fines for underpayment.** Any employer who does not pay at least the remuneration to which the employee is entitled to, commits an administrative offence and is fined by the Administrative Authority (LSD-BG, sec29). For each employee, the fine is €2,000 to €20,000 up to three employees. This amount can be cumulated up to €50,000 for more than three employees and repeated offences. It is unclear yet whether the Maksimovic ruling also applies to violations regarding underpayments.

Legally binding decisions from May 2011 to January 2019 concerned 887 posting cases with respect to underpayment, 2.168 cases of failure to keep documents available and 1.832 cases of impediment of inspection (Murr, 2019), which might now be affected by the CJEU ruling (see Box 1).

Austria has not legally transposed the **amended Posting of Workers Directive 2018/957** yet (as of December 2020). The amended PWD directive came out after the LSD-BG was already in place and called for EU countries to put it into force by 30 July 2020. It requires equal remuneration (sec18; and not just minimum rates of pay), including equal allowances and reimbursement of expenditure of posted and local workers (sec8), and equal working conditions such as accommodation. Remuneration includes seniority allowances, daily allowances supplements for dirty, heavy or dangerous work, 13<sup>th</sup> month bonuses, meal vouchers, etc (Glowacka, 2019). The amended PWD clarified obligations to monitoring, control and enforcement by national authorities. Most areas included in the Revised Directive are already part of the Austrian legislation, so although the Revised Directive has not been transposed per se, only few clauses (such as in the area of subcontracting) are missing in the Austrian law.

#### 4.1.2 Temporary agency work

The LSD-BG and the **Temporary Agency Work Act** (Arbeitskräfteüberlassungsgesetz, AÜG) aim to protect temporary workers. No disadvantages regarding working conditions and payment compared to regular employment are permitted.

The LSD-BG mentions side by side posting employers and temporary work agencies bringing foreign workers to Austria. Like posting employers, foreign temporary work agencies need to report the employment of their workers to the Central Coordination Agency prior to commencement of work, pay according to the collective agreements, provide continued remuneration in cases of illness or accident, grant annual leave entitlements and also comply with the Austrian regulations regarding working time, termination and dismissal, maternity protection, safety and health at the workplace, etc.

The AÜG applies to workers hired out on a cross-border basis, as stated in the LSD-BG (sec6), i.e., when a cross-border temporary agency makes their workers available (hires them out) to a firm in Austria, the user undertaking, for the purpose of performing work. A temporary work contract of the temporary work agency with the user undertaking specifies the conditions of the assignment (e.g. number of workers, qualifications, duration, pay). The temporary work agency remains the employer of the hired-out workers for the duration of the assignment. However, with respect to occupational safety and health, the Austrian user undertaking is considered the employer and, therefore, liable for OSH requirements. The AÜG refers to the OSH regarding health and safety. Also, the Austrian contractor hiring workers temporarily from foreign TWAs assumes the liability and responsibility of the regular employer for the subcontracted workers.



In the event of underpayment, the TWA may risk fines and being prohibited from sending workers to Austria. Furthermore, Austrian user undertaking alongside with the temporary work agency can be fined for offences regarding record keeping, underpayment, etc (AÜG, sec14).

The LSD-BG (sec16) states special reporting requirements for temporary work agencies, e.g. that domestic authorities need to cooperate in the field of temporary work agency. For example, this includes the transmission of information on the temporary work agencies and their hired-out employees.

#### 4.1.3 Social security

Social security insurance does not apply to posted employees or temporary agency workers from abroad, as outlined in the Labour Contract Adjustment Law (AVRAG). According to EU rules, persons are subject to the regulations of one Member State only. Posted or hired-out workers are subjected to social security in the sending country (Article 12 and 13 of Regulation (EC) 987/2009). This means, companies from Austria are subject to social security regulations in Austria while posted or hired to work abroad. Likewise, posting companies from abroad need to insure their posted workers in accordance with the social insurance regulations of the sending country, which usually amounts to lower contributions in the sending country than in Austria considering the posting patterns (see Gagawczuk 2019b).

For issuance of a PD A1, the following two conditions need to be met: The employee

1. is posted or hired out for equal or less than 24 months at most (12 months from August 2020)
2. does not replace a worker whose posting period has expired (no successive postings).

The PD A1 confirms an existing social insurance for the posted worker in the sending country. The PD A1 has a “legally binding character” with respect to social security and health insurance responsibilities of the origin country (Gagawczuk, 2019b). This means that even if a posting would turn out to be fake, the PD A1 would be valid as long as the social security authority in the sending country maintained its responsibility. If the social insurance authority were willing to revoke the A1 portable documents, then the workers could be insured with the receiving country’s social insurance agency. However, since the social security agency receives money, it usually does not have an incentive for doing that. In practice, this process is extremely tedious and time-consuming and, therefore, it is rarely practised.

Before posted workers begin to work in Austria, the employer needs to notify the **Central Coordinating Agency Charged with Investigating Illegal Employment** (Zentrale Koordinationsstelle, ZKO) with the posted workers’ social security numbers as part of the ZKO reporting. Such a notification also includes the naming of the exact dates and times of each employee’s planned posting period. This is challenging for some companies that are located near the Austrian border and perform work in Austria on a regular basis, sometimes only for an hour of installation. Some of those work orders may easily shift to other days, which would require the ZKO notification to be changed. Failure to report may lead to fines of up to €10,000 per person, see LSD-BG, sec26). The figures between the A1 forms and the ZKO forms may differ due to the different granularity of reporting.

**Special provisions for construction workers.** The **Annual Leave and Severance Pay for Construction Workers Act** (Bauarbeiter-Urlaubs- und Abfertigungsgesetz, BUAG) applies to workers who are employed by construction businesses including companies who post abroad

(BUAG, sec1) and foreign companies who post to Austria. This means that the law applies even to workers who are covered by the social insurance scheme in their home country during posting. Compared to regular workers, construction workers have special entitlements. For example, after a qualification period of 52 weeks, workers are entitled to 30 working days' annual leave (sec4).

As stated above, posting companies need to register with ZKO, which then passes the information to the Austrian Construction Workers' Holiday and Severance Pay Fund (BUAK)<sup>15</sup>. BUAK is an organization of the social partners of the construction industry and has a public mandate to enforce compliance with posting regulations in the construction sector. BUAK's leadership is composed of one employers' representative and one trade union representative. The primary purpose of BUAK is to administer holiday, severance payments and other benefits for construction workers. Furthermore, BUAK is authorised by the LSD-BG to carry out inspections of construction sites to enforce the equal payment of wages and benefits to construction workers and to ensure that employers and employees pay their contributions to the fund. If BUAK construction site investigators find irregularities or are unable to obtain the required documentations, they report to BUAK's coordination unit, and BUAK's lawyers investigate and make a case and file charges with the district administrative court. The BUAK investigators see themselves as a strong, foundational link in the system leading then to the BUAK lawyers and to the courts.

Posting construction companies need to provide follow-up reports to BUAK if the construction work lasts longer than one calendar month. Employers need to report monthly and inform about any changes. They are obliged to pay monthly wage supplements per workers to BUAK to cover annual leave pay entitlements. Posted workers acquire a proportionate share of annual leave beginning with the first day of employment. If the BUAK investigators find irregularities, they will again transfer the case to BUAK lawyers to further pursue.

Construction companies registered in any EU/EEA Member State must have the following documentation on hand at the work site in Austria, or immediately provide BUAK with access in electronic form:

- Documentation of the employee's registration for social security (social security document E 101 as per EEC Directive 1408/71, social security document A1 as per EC directive 883/04)
- A copy of the posting form, the so-called *Entsendemeldung* – ZKO 3.

BUAK is legally authorized to check the availability of these documents, to view and make copies of these documents.<sup>16</sup>

The Austrian trade union for construction workers (Gewerkschaft Bau-Holz, GBH) actively informs posted construction workers about their rights under Austrian law and encourages them to join the union, although posted workers are typically not members of any Austrian union. GBH cooperates with BUAK that is responsible for informing construction workers quarterly about their accrued entitlements.

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<sup>15</sup> BUAK's homepage in English, retrieved December 18, 2020, from [https://www.buak.at/cms/BUAK/BUAK\\_10.0/home](https://www.buak.at/cms/BUAK/BUAK_10.0/home).

<sup>16</sup> See BUAK wage and social dumping, retrieved December 18, 2020, from [https://www.buak.at/cms/BUAK/BUAK\\_10.2.8.1/for-employers/inspections/wage-and-social-dumping](https://www.buak.at/cms/BUAK/BUAK_10.2.8.1/for-employers/inspections/wage-and-social-dumping).

#### 4.1.4 Health insurance and coverage

According to EU rules, persons are subject to the regulations of one Member State only. In the case of posting, posted or hired-out workers are subjected to health insurance and coverage in the sending country (Article 12 and 13 of Regulation (EC) No 987/2009). Austrian companies who post transnationally are subjected to Austrian health insurance regulations. Vice versa, foreign companies who post and hire out workers to Austria need to pay social and health contributions to the authorities in the country of origin. The employee whose posting is planned to Austria will receive a PD A1 from his responsible insurance provider as proof of health insurance coverage, where the social security legislation of the sending state is applied. This form also needs to be submitted to the authorities in the host country. Furthermore, the European Health Insurance Card (EHIC) is issued by the national health insurance provider of any of the 27 EU countries and gives workers access to medically necessary public healthcare during their periods of posting in Austria.<sup>17</sup>

The workers safety and health are protected on their job. The **Occupational Health and Safety Act** (OHS), also called the Employee Protection Act (ArbeitnehmerInnenschutzgesetz), specifies all national occupational health and safety regulations that include posted and hired-out workers. The Austrian Occupational Safety and Health Strategy 2013–2020 sets priorities including reducing accidents at work, improved risk assessment and awareness. The OHS strategy stresses the employer's obligation to ensure that employees are provided with the necessary equipment to protect them against occupational health risks. This equipment must comply with the latest technical requirements. In addition, employers must take appropriate action with respect to medical assistance when needed in case of an occupational accident. They must also establish rooms for rest periods in accordance with the latest hygienic standards.

In the case of accident or illness in the host country, the posted worker will receive care from an Austrian health provider regardless of which European country his health coverage is from, as documented by the PD A1 and the EHIC. The Austrian health insurance agency will then cooperate with the health insurance of the sending country to transfer health-related costs to the latter.

A previous study on the OSH of posted workers to Austria (Hollan and Danaj, 2018) found that despite the regulatory framework and the complex enforcement structures in place with good collaborative practices, the OSH of posted workers still often falls short due to a combination of factors, such as the temporary nature of their posting assignments that lead to neglect from both employers and workers; workers' dependence on the employers and their pressure to high levels of work intensity; lack of knowledge on local OSH standards and other requirements; and language barriers (see also Danaj & Zólyomi, 2018).

#### 4.1.5 Company law

The **Corporate Code** (Unternehmensgesetzbuch, UGB) in Austria is based on several laws that regulate the incorporation, registration and running of a company in Austria. The UGB pertains to Austrian companies in general including those who post and hire out abroad, but it does not have specific regulations for the latter. Also, the UGB does not apply to foreign companies who post or hire out in Austria. According to UGB, a company's branch offices belong to their

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<sup>17</sup> European Health Insurance Card, retrieved December 18, 2020, from <https://ec.europa.eu/social/main.jsp?catId=559>.

headquarters. Foreign companies who have branch offices in Austria have the possibility to obtain a trade licence (Gewerbeschein, sec12).

Please view Table 4 for an overview of rules and regulations on posting in the Austrian context.

*Table 4. Rules and regulations on posting in the national context*

	Law/Regulation	Posting Workers Rights	Posting Companies Rights and Incentives	Posting Companies Obligations	Public Authorities Mandate
<b>Posting-specific or cross-border service provision regulations</b>	LSD-BG	<i>LSD-BG:</i> Minimum pay, annual leave, working hours	<i>LSD-BG:</i> Cross-border service provision	<i>LSD-BG:</i> Notifications, record keeping, ensure workers' rights	<i>LSD-BG:</i> Monitoring, control, investigation, enforcement
<b>Temporary Agency Work regulations</b>	LSD-BG, AÜG	<i>AÜG, LSD-BG:</i> Minimum pay, annual leave, working hours	<i>LSD-BG, AÜG:</i> Cross-border service provision	<i>AÜG:</i> Notifications, record keeping	<i>LSD-BG, AÜG:</i> Monitoring, control, investigation, enforcement
<b>Health insurance and coverage</b>	LSD-BG, ASV (outgoing)	<i>LSD-BG, ASVG (outgoing):</i> Right to social insurance, accident coverage	<i>LSD-BG:</i> <i>Contributions paid to sending country</i>	<i>LSD-BG, ASVG (outgoing):</i> Notification	<i>LSD-BG:</i> Investigation, cross-border collaboration
<b>Social security regulation</b>	LSD-BG	<i>LSD-BG, ASVG (outgoing)</i> Right to social security	<i>LSD-BG:</i> <i>Contributions paid to sending country</i>	<i>LSD-BG, ASVG (outgoing)</i> Notification, contributions	<i>LSD-BG:</i> Investigation, cross-border collaboration
<b>Company law</b>	UGB (outgoing)	<i>UGB (outgoing)</i>	<i>UGB (outgoing)</i>	<i>UGB (outgoing)</i> Rules how to register and run an Austrian company	<i>UGB (outgoing)</i> Monitoring, Investigation

## 4.2 National implementation and enforcement

This part of the report focuses on the question of enforcement, in particular: How does the implementation of the Posting of Workers Directive interact with national regulations related to posting such as the rules on social security, health insurance, temporary agency work and company law? The perspectives of the public authorities, social partners and employers are addressed in detail, especially where they differ.

### 4.2.1 Institutional framework

National competent authorities and agencies made great efforts early on after the transposition of the Posting of Workers Directive (96/71/EC) to protect posted workers from increased posting-related challenges (Hollan & Danaj, 2018). LSD-BG (sec11) details the following enforcing authorities and agencies and their mandates:

- **Tax authorities:** They verify compliance with pay for employees who are not subject to the General Social Insurance Law (Allgemeines Sozialversicherungsgesetz, ASVG),

including posted workers. This includes freely accessing the place of employment, requesting information and inspecting documents.

- **The Competence Centre “Fight against wage and social dumping”** (Kompetenzzentrum Lohn- und Sozialdumping Bekämpfung, CWSD), as part of the Austrian Health Insurance Fund (Österreichische Gesundheitskasse, ÖGK)<sup>18</sup>, receives the results of the investigations by the tax authorities. The CWSD investigates the wages of posted workers who are not subject to the general social security law (Allgemeines Sozialversicherungsgesetz, ASVG). The CWSD verifies pay levels, reports offences, maintains a record of offences, and reports to the District Administration Authorities. The CWSD keeps a record of penal proceedings and decisions for five years (sec35). It supports the investigation by the Financial Police (see below) against fake posting by collaborating with the sending countries’ social insurance funds to assess the validity of social insurance contributions. The CWSD is also responsible for the database of administrative prosecutions initiated in case of violations of the LSD-BG. This register of firms that violated the LSD-BG can be accessed by contracting parties.
- **Health insurance providers** are entitled to inspect documents (sec14). This applies to Austrian firms posting abroad.
- **Construction Workers’ Holiday and Severance Pay Fund** (see above under 4.1.3) is to check for example whether construction companies keep documents readily available (sec15). This applies to companies posting abroad and to Austria.
- **District Administration Authorities** (Bezirksverwaltungsbehörden) carry out administrative penal proceedings, for example underpayment falls under administrative criminal law.
- **Central Coordinating Agency Charged with Investigating Illegal Employment** (Zentrale Koordinationsstelle für die Kontrolle der illegalen Beschäftigung, ZKO; see above under 4.1.3) is charged with investigating illegal employment, collecting and processing posting reports.
- **The Financial Police** (Finanzpolizei<sup>19</sup>) of the Federal Ministry of Finance supports the ZKO. It is the independent anti-fraud agency of the Federal Ministry of Finances (Bundesministerium für Finanzen, BMF), as laid out in the Tax Administration Organization Law (Abgabenverwaltungsorganisationsgesetz, AVOG; sec12). It is the principal organization to fight illegal employment practices including wage and social dumping in Austria based on the Employment of Foreigners Act (Ausländerbeschäftigungsgesetz, AuslBG), AVRAG etc. The Financial Police enforces regulations concerning minimum pay and temporary agency work, as well as compliance with social insurance and tax laws. It controls workplaces to ensure that posted workers are registered and that their wages and employment conditions comply with the legal requirements.

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<sup>18</sup> Until 31.12.2019, the Competence Centre was organized by the Vienna Regional Health Insurance Fund (Wiener Gebietskrankenkassen – WGKK). Effective on 01.01.2020, all regional health insurance funds were merged into one nation-wide health insurance fund.

<sup>19</sup> Tasks and organization of the Financial Police, retrieved December 18, 2020, from <https://www.bmf.gv.at/ministerium/aufgaben-und-organisation/finanzpolizei.html>.

- **Labour Inspectorate** (Arbeitsinspektorat) as an enforcement Authority with respect to Occupational Safety and Health regulations. The Labour Inspectorate is responsible for protecting the lives and health of employees by monitoring compliance with the OSH law such as adherence to working time regulations. When a construction project lasts more than five working days, it needs to be reported to the labour inspectorate (OSH, sec97). The Labour Inspectorate is organized into one central labour inspectorate, housed at the Federal Ministry of Labour, Family and Youth (Bundesministerium für Arbeit, Familie und Jugend, BMAFJ), and 17 regional offices, plus one special inspectorate for the transport industry and one for the construction sector for Vienna and Lower Austria (Hollan & Danaj, 2018<sup>20</sup>). The Labour Inspectorate does not control the social security status, or the wages of workers posted to Austria.

The above-mentioned agencies cooperate with authorities of other EU Member and EEA States and provide mutual assistance (Amsthilfe), as set out in the Enforcement Directive. This includes obtaining and providing information as well as request authorities to monitor compliance with labour-law provisions, investigate further or decide on enforcement (cf., LSD-BG, sec17).

#### 4.2.2 Enforcement agencies practices

The collaboration of Austrian enforcement agencies appears to work well according to the interviewed stakeholders. Cooperation of authorities to jointly investigate a construction site may cover human rights (Criminal Police), labour rights (BUAK, Financial Police), occupational safety and health issues (Labour Inspectorate, AUVA), and financial issues (Financial Police).

Financial police officials investigate work sites on a routine basis, for example when a new construction site was reported. A Financial Police official points out that every construction site is a temporary event, therefore it is easier that it slips through the fingers. They usually work in teams, so they investigate the documents in the construction office while others interview the construction workers, asking for their identification card and collecting personal data through a survey, which is translated in thirty languages. Despite this joint effort, a construction site inspector stated that investigators are able to only obtain a fraction of the overall situation: “I do not get an overall picture at such an investigation, but I only get a partial piece of the whole.” As a result, inferences from the observations requiring intuition and experience by the inspectors are sometimes needed.

According to a Financial Police official, the Financial Police has never conducted an investigation at a construction site that was without one cause for complaint. Similarly, a company representative estimates that 98% of posting companies do not comply with the Austrian rules. From our research we find that it is not necessarily the case that companies do not always want to comply, but because some rules are complicated to adhere to. Still, a social partner stated that the legal means are in place in Austria, but the enforcement of the law is a great challenge and many companies slip through.

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<sup>20</sup> See also the Labour Inspectorate’s website, retrieved on December 29, 2020, from <https://www.arbeitsinspektion.gv.at>.

### 4.2.3 Enforcement through transnational cooperation

Transnational cooperation and enforcement are large challenges and have been difficult to achieve up to now. According to a construction union representative, transnational enforcement does not fully work yet. International enforcement appears to work with respect to criminal law, but not with respect to administrative law. One exception is the enforcement of road-safety-related traffic offences, where individuals are legally prosecuted across borders.<sup>21</sup> Whenever a posting company violates Austrian law and leaves Austria, there is no enforcement agreement to locate and convict companies abroad according to a Chamber of Commerce representative. Austrian authorities are dependent on their administrative counterparts in the receiving countries to locate the companies and to enforce the fines, which may be slow and ineffective (Scheiblauer, 2018).

In prosecution efforts in the event of cross-border assignments, the sending and receiving countries need to closely collaborate. The **International Market Information System (IMI)**<sup>22</sup> is designed to assist in this collaboration, being a computer-based information network intended for administrative cooperation of national, regional and local authorities. The Enforcement Directive expanded its use to the posting of workers. IMI functions as a tracking mechanism to follow information requests from one authority to another across borders. The Enforcement Directive (Article 6) sets time limits for responding to IMI requests. For example, Member States should respond in two working days in urgent cases such as confirming a company's VAT registration. All other requests can be addressed within 25 working days. The Austrian LSD-BG refers to IMI as being intended to support mutual assistance (sec39).

The amended PWD introduced updates to the IMI to be found in the Posting of Workers Information Request Module, including new questions concerning all mandatory elements of remuneration in a host country (and not just minimum pay rate), accommodation and allowances.<sup>23</sup>

Austrian authorities can make use of IMI to gain information about EU companies who post their workers in Austria. However, IMI does not cover social insurance information (Danaj et al, 2020). For example, the Financial Police cannot obtain information in the IMI system on social insurance, but they have to go through the Austrian social insurance to do so—which is a large obstacle for timely enforcement according to a Financial Police official. Generally, IMI requests for cooperation from Austrian authorities to other countries, especially neighbouring countries, has been much higher than vice versa (Murr, 2019). Austrian authorities have used IMI requests for notification of penalty decisions as well as requests for recovery of penal decisions (Murr, 2019). They describe IMI as valuable and good, but slow at times (Danaj et al, 2020; Haidinger, 2018).

Working across border has been challenging and cumbersome, because posting companies may not be easily found across the borders. The legal proceedings most often only take place after

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<sup>21</sup> Directive (EU) of 11 March 2015, facilitating cross-border exchange of information on road-safety-related traffic offences, retrieved February 15, 2021, from <https://eur-lex.europa.eu/legal-content/EN/TXT/?qid=1427192018025&uri=CELEX:32015L0413>.

<sup>22</sup> International Market Information System, retrieved December 18, 2020 from [https://ec.europa.eu/internal\\_market/imi-net/index\\_en.htm](https://ec.europa.eu/internal_market/imi-net/index_en.htm).

<sup>23</sup> Questions can be found under the following link retrieved December 18, 2020, from [https://ec.europa.eu/internal\\_market/imi-net/library/question\\_sets\\_forms/index\\_en.htm](https://ec.europa.eu/internal_market/imi-net/library/question_sets_forms/index_en.htm)

significant time has lapsed and potential witnesses (e.g. posted workers) are no longer available according to a Chamber of Labour representative. A posting company may also file for bankruptcy. This means the workers may win the case, but they may not receive the amount claimed due to the bankruptcy. Under these circumstances, workers may not have an incentive in suing companies if it does not lead to a positive outcome for them.

It is difficult and cumbersome to verify the authenticity of A1 documents (social insurance) across borders, as several interviewees mentioned. Employers currently obtain and store hard-copy forms in the language of the receiving country, which states that an employee was registered at a certain time with a certain social insurance entity. Ensuring the authenticity of this form may take weeks or even months—much too long to interfere with or stop a posting company’s assignment.

In the future, the **Electronic Exchange of Social Security Information (EESSI)** may aid in verifying the authenticity of A1 documentation. The EESSI is regulated in Regulation (EC) 987/2009 for implementing Regulation (EC) 887/2004 on the coordination of social security systems. The EESSI aims at improving and speeding up the cross-border communication between social security institutions through electronic exchanges and real-time updates. It provides a single access point and a single national gateway as entry point for electronic communication internationally. The implementation schedule for Austria was July 2016 to December 2018, coordinated by the Main Association of Austrian Social Security Institutions, which is the designated owner and handler of EESSI access and gateway in Austria.<sup>24</sup> However, despite its planned finalization in 2019, the EESSI is not fully operational as of 2020 at the European level to provide the desired electronic information exchange between social security institutions. As social partners assessed, the EESSI system is far away from a European social insurance database, which would be needed in order to timely investigate cases.

Austrian officials reported a frequent lack of cross-border cooperation on social insurance, which results in a lack of information, evidence, and action. If cross-border cooperation existed at all, officials from sending countries often would not fulfil the requests for social security information or only with a delay, which may result in lengthy processing times. Owing to a lack of information, implementing potential penalties becomes difficult or impossible. Furthermore, language barriers also may add to lengthy processing times (Jorens & De Coninck, 2019). According to Austrian officials, data exchange has sometimes been made difficult by national rules on data protection. This means that requests for information are often not complied with as a result of data protection rules under existing national legislative provisions.

In general, there is not sufficient harmonization of social insurance and labour law in Europe from a judicial point of view. According to a social partner representative, the social insurance law is too “rigid”, especially when it comes to its legally binding character. For example, rigid rules apply when the Austrian social insurance agency realizes that a worker should be insured in Austria rather than in the sending country. The procedure of reassignment is very cumbersome and lengthy and is not successful if the social insurance of the sending country maintains that the insurance is rightfully in place.

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<sup>24</sup> EESSI\_AT—Connecting Austria to EESSII. Retrieved December 18, 2020, from <https://ec.europa.eu/inea/en/connecting-europe-facility/cef-telecom/2016-at-ia-0002>



The **European Labour Authority (ELA)**<sup>25</sup> appears to be the future solution for cross-border enforcement for both the labour and social security domain. Established by Regulation (EU) 2019/1149 in 2019, ELA is concerned with posting of workers issues across Europe and should guarantee adequate social protection of workers and improve cross-border enforcement. In particular, ELA “should assist the Member States and the Commission in strengthening the access to information, should support compliance and cooperation between the Member States in the consistent, efficient and effective application and enforcement of the Union law related to labour mobility across the Union, and the coordination of social security systems within the Union, and should mediate and facilitate solutions in the case of disputes” (sec6). In 2020, it is too early to determine whether ELA will be able to fulfil its mandate as outlined above.

Two representatives of Austrian unions demanded ELA to become a European-level inspection authority for employment-related matters. However, ELA was created as a “toothless tiger” because so far it collects information, observes and discusses issues rather than has the right to enforce regulations and impose fines. ELA would need to be equipped with legitimization for cross-border enforcement whenever it does not work. But this enforcement is not yet feasible as national practices and usances still dominate according to union representatives. They are pessimistic about any changes in the foreseeable future—regarding ELA as a symbol for a powerless body by levelling down the standards for countries that have high wages and good social protection.

#### 4.2.4 Enforcement agencies challenges

The interviews with enforcement officials showed several challenges including those related to language, site coordination, OSH standards, penalties and workers’ education.

**Language barriers.** A labour inspector identifies the language barrier as one of the largest problems when inspecting sites. Their statement confirms earlier findings on the impact of language barriers in enforcing OSH standards and labour rights in general for posted workers in Austria (Hollan and Danaj, 2018). The language barrier between inspecting officials and workers is sometimes combined with the unease and fear among workers who often are also uninformed. The language barriers may also be combined with low levels of education, resulting in the difficulty for workers to fill in questionnaires. Normally, there are no translators available unless it is an investigation of a criminal charge or a major work accident. Nonetheless, a BUA construction site inspector recalls that he is able to communicate in 98% of the cases on the construction site, even when he sometimes needs to communicate with hands and feet. Labour inspectors and BUA inspectors utilize forms written or translated in several European languages. Most often, a foreman<sup>25</sup> or other person has a command of the German or English language. This may become problematic if only that person’s voice, but not the other workers voices are directly heard, especially if they are in position of relative power, as in the case of the foremen.

**Uncoordinated construction sites.** Construction sites with more than one company fall under the law for construction site coordination, which calls for a construction site coordinator who is responsible for the workers’ safety and health. Larger renowned construction companies are careful in following the laws, because they do not want to risk their reputation and high fines according to a company representative. Smaller construction sites with only one company and

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<sup>25</sup> The European Labour Authority Website, retrieved December 18, 2020, from <https://www.ela.europa.eu>.

maybe 6 to 7 persons are less organized than bigger sites, for example they may not have a space dedicated for workers' breaks. The BUAKE inspectors often need to improvise, e.g. using polystyrene disks as pads, and need to be careful to gain a comprehensive overview over all trades represented at the site, so that certain trades do not slip away. With an electronic tablet, BUAKE inspectors are able to retrieve and provide information on site regarding personal data such as holiday entitlements of an individual worker.

**Austrian versus European standards in OSH?** Agencies enforcing workers' safety and health find that some sending companies fulfil their home country's OSH requirements, which may be slightly different or at times lower than the Austrian requirements. In general, the OSH framework Directive is transposed to all European Member States, but Member States could have adopted higher standards, thereby maintaining differences across the EU. In the case of posting companies and posted workers, it may thus be more a matter of neglecting OSH standards due to the temporary cross-border nature of posting (Hollan & Danaj, 2018). Furthermore, Austria seems to enforce its own national OSH standards so posting companies to Austria may not be aware of these selectively higher national standards than the European minimum ones. Further training and better access to information on OSH standards in Austria should be made available for employers and workers alike.

**Austrian versus European levels of administrative fines?** A prime example of challenges faced by enforcement agencies is illustrated by the case "Maksimovic and Others" at the Court of Justice of the European Union (CJEU). This case raises the issue whether the Austrian Law or the European Directives need to be enforced regarding administrative penalties. This case is discussed in more details, because several Austrian interviewees stressed its importance for future posting practices. Several social partner interviewees did not agree with the ruling, because it would open up the possibility for posting companies to engage in wage and social dumping. On the other side, an employee of a posting company reported that the company was unfairly issued a high administrative fine, which was reduced in court later on.

***Box 1: CJEU ruling about "Maksimovic and Others" about administrative penalties***

On 12 September 2019, the CJEU ruled that national legislation is precluded from collecting high, cumulative administrative fines, which the Austrian legislation had imposed.

The joined cases "Maksimovic and Others" (C-64/18, C-140/18, C-146/18 and C-148/18) concerned a large Austrian paper/pulp company from Styria (Zellstoff Pöls) which charged an Austrian engineering company with the task to conduct repairs, who in turn subcontracted a Croatian company. The Financial Police visited the construction site three times and could not obtain the right paperwork for 217 posted workers including 200 Croatian, Serbian and Bosnian workers. The Croatian company (Maksimovic) and the Austrian engineering company as third-party employer were fined €13 million for failing to comply with administrative obligations and payroll documentation. If not paid, this fine could be converted to a prison sentence between 1,600 and 1,736 days for each responsible agent.

The Austrian plaintiff argued that restricting the freedom to provide services is justified by the objectives of social protection of workers and of combating fraud, particularly social security fraud, and preventing abuse.

The persons subject to these penalties appealed. The Regional Administrative Court of Styria requested a preliminary ruling from the CJEU about the practice that administrative authorities penalized posting companies for not making available documents to pay and/or social security and for failing to report the posting of workers the central to the coordinating office (ZKO notifications). It, therefore, posed the following question to the CJEU: Is national law precluded from imposing heavy and cumulative fines and imposing imprisonment if fines are not paid?

The CJEU ruled that the PWD and Enforcement Directive are not relevant for answering the above questions, because they do not deal with monitoring measures. Instead, the CJEU regarded the practice of high, cumulative fines as incompatible with the freedom to provide services in the European Union outlined in Article 56 of the

**Treaty on the Functioning of the European Union (TFEU):** “All measures which prohibit, impede or render less attractive the exercise of the freedom to provide services must be regarded as restrictions on that freedom.”

Accordingly, the CJEU ruled:

“The Court has further held that national law which provides for an obligation to draw up and keep social and labour documents on posted workers in the host Member State might give rise to additional expenses and economic burdens for undertakings established in another Member State and therefore constitutes a restriction on the freedom to provide services”. ... Therefore, it is clear that national legislation imposing penalties on both a service provider and the recipient of those services for non-compliance with such obligations which, as such, constitute restrictions on the freedom to provide services, is likely to render the exercise of that freedom less attractive. Accordingly, national legislation such as that at issue in the main proceedings constitutes a restriction on the freedom to provide services.”

The CJEU concluded that the severity of the penalty must be commensurate with the seriousness of the offence. In particular, the administrative or punitive measures permitted under national legislation must not go beyond what is necessary in order to attain the objectives legitimately pursued by that legislation.

Finally, the CJEU ruling (Maksimovic and Others) stated that the TFEU must be interpreted as precluding national legislation from imposing fines:

- which may not be lower than a predefined minimum amount;
- which apply cumulatively in respect of each worker concerned and without an upper limit;
- to which is added a contribution to court costs of 20% of the amount of the fines if the appeal against the decision imposing those fines is dismissed, and
- which are replaced by custodial sentences in the event of non-payment.
- Fines need to be proportionate to the offence, as the Enforcement Directive states that “Member States may only impose administrative requirements and control measures ... justified and proportionate in accordance with Union law.”

The question of proportionality is not fully clarified. The amended PWD adds further that penalties shall be “effective, proportionate and dissuasive” (Article 5). These concepts would need to be further clarified.

According to an employer representative, it remains to be seen whether the necessary regulations of this CJEU provision will initiate an amendment process of the LSD-BG towards a more employer-friendly version.<sup>26</sup>

As a result of this court ruling against the cumulation of fines, posting companies may engage in an “economic calculation” to their favours, according to a Chamber of Labour representative. This calculation, however, may encourage practices of disregarding obligation regarding minimum pay or additional payments. For example, if the employer knows that the likelihood of an investigation by the Financial Police is normally 10 percent, and the fines are capped at a certain level, the company could calculate whether and when it would make sense economically to take the risk of not paying according to the law and then not providing the wage documents. Then the company could profit from underpayment even when paying fines in one out of ten cases if these fines together turn out to be less than the underpayment. Not submitting wage records is preferred for companies as this is considered only as a formal offence (“Formaldelikt”) according to social partners. Would the companies disclose wage records which are not aligned with the regulations, they would risk being convicted for social fraud.

### 4.3 Employer practices and challenges

This part of the report focusses on employer practices and challenges and answers the following question: How does the interplay of EU and national rules on posting and the related areas influence employers’ practices and their deliberations to engage in posting?

#### 4.3.1 Employer practices

There is a disagreement among the interviewed stakeholders whether or not foreign companies can offer their work cheaper than Austrian companies. A legal representative of foreign

<sup>26</sup> Anna-Maria Minihold. EuGH kippt Millionenstrafe im Fall Andritz, retrieved December 18, 2020, from <https://www.wko.at/branchen/k/industrie/eugh-kippt-millionenstrafe-im-fall-andritz.html>.

companies stated that if the posting is done correctly, posting workers may incur more costs for a foreign company than establishing a branch office in Austria. This were the case, because the potential savings have been reduced for sending companies with the amended PWD, which came into force in July 2020. It would require equal remuneration (and not just equal minimum pay) and equal working conditions.

Compared to Austrian companies, additional costs may be incurred on legal services, document keeping, tax services, housing costs, etc. For example, both interviewed foreign companies worked with an Austrian accounting firm and a law firm. This became necessary, because in one case, the company was imposed administrative fines and sought a reduction of those. The document keeping requirements made it also necessary to work with an Austrian company that would keep those on file. Then documents do not have to be on site, which is sometimes difficult to achieve. However, such added services could increase the labour costs.

Still, the representative of a foreign company stated that they could still offer cheaper, competitive prices even when following all the legal requirements, as illustrated as follows.

**Differential percentage of social insurance contribution among sending and host country.**

The main place where a company can offset added costs is with lower social insurance contributions in their home countries. Social insurance contribution equals 27% of the gross wage in Austria, compared to 16% in Slovenia (Hofstadler et al, 2016), for example. This can lead to at least 10-15% reduction of overall costs for posted workers, and more in the case of workers posted from other countries where the contributions are even less.

**Wage level of the sending country as assessment basis.** Sending countries often do not demand sending employers to pay the full social insurance amount of the wage they pay the workers in the host country. One practice for posting companies is to only use the minimum wage or wage they would pay their worker domestically as assessment basis for social security payments instead of the Austrian collective agreement wage. This practice is legal from a tax and social security perspective. For example, an interviewee from a company explained that they issue two wage documents for a posted worker: One that reflects the wage level of the sending country and which is used for the social security payments, plus an annex showing the additional payment for Austria. This practice is legal but may negatively affect competition among companies. There is currently a complaint and process at the European level pending (2020) that Slovenia allows companies to use as basis for assessment the minimum wage rather than the full wage paid to the posted worker.

Public stakeholders and social partners stated additional, legally questionable practices that a foreign employer could use to optimize costs. Those, however, were not mentioned by employers. These reported practices are listed below:

1. **Reducing payments to social insurance agencies.** Posting companies may engage in underpayment of social insurance contributions to the sending country. This practice could be regarded as legal social dumping. This does not concern the Austrian law, because posting employers pay social insurance in the sending countries according to the PWD. The following practices were mentioned:

- *Paying social insurance for working part-time only.* One practice is to pay social insurance for part-time workers who then work full-time in Austria.

- *Registering posted workers only for a few days* to receive the A1 documents, but then deregistering them again, although they are still working. The companies still possess the A1 document to pretend registration, which cannot be easily verified. In certain EU countries such as Slovenia, however, this practice is no longer possible, because the A1 documents are issued and verified electronically.
  - *Not paying social insurance contribution*, while at the same time registering posted workers for social insurance. This could be possible, because neither the sending country nor the host country may monitor this.
  - *Engaging in fraudulent issuance of A1 documents* altogether where fake A1 documents are issued. As a result of such practices, for example posted employees would not receive their full amount of entitled pension contribution later on.
2. **Reducing payments to BUAK (Austria).** Sending construction companies not paying BUAK fees can be considered a social fraud and a criminal offence according to the law: “Anyone who reports a person to the Construction Workers’ Holiday and Severance Pay Fund in the knowledge that the surcharges accruing as a result of the notification are not to be paid in full according to the construction workers' leave and severance payment law must be punished, or who arranges or orders them if the surcharges accruing as a result of the report are not paid in full” (Criminal Code 153 C, D, E). Punishment may entail “imprisonment from six months to five years.” Still, the following practices may occur:
- *Deregistering shift workers.* Within Austria, posting companies may “optimize” payments to BUAK. A representative of BUAK observes the common practice that posting companies register and deregister posted workers due to shift work, despite the fact that this practice is not following the law. The goal is to keep the sending days to a minimum in order to optimize costs and to contribute less to BUAK.
  - *Reporting workers as part-time.* Companies find further ways to reduce payments to BUAK, for example by employing their workers part-time. BUAK responded by requiring time sheets and, therefore, more bureaucratic efforts for part-time workers.
3. **Engaging in pseudo self-employment.** This is a practice where employees are documented as self-employed with a trade license (“Gewerbeschein”), but in reality, they would function as employees of a company according to an interviewee of the Chamber of Labour. The reason for practicing pseudo self-employment is because the persons are then not subjected to certain regulations for (posted) employees, but for example are free to organize their work time, workplace and how to perform the work. This also affects social security payments in the origin country, for which the sending company would no longer be responsible.
4. **Holding back daily allowances and other payments.** Employers may attempt to optimize expenses by not paying daily allowances, hazard pay and other payments in addition to the minimum wage. However, daily allowances are considered part of the minimum wage, according to 2015 CJEU verdict *Sähköalojen ammatiliitoo*. In Austria, daily allowances are not considered part of the minimum pay, however, because they are neither taxable nor used as basis for assessing social insurance. Therefore, not paying daily allowances is often only considered a trivial offence. The amended PWD, however, requires equal pay for “remuneration”, which is not just minimum pay, but also includes daily allowances and

other payments. In fact, a civil court case is pending in Austria in 2020, where two Slovenian employees have sued their employer for withheld daily allowances. The declaratory action is expected for early 2021. This verdict is expected to have a “signal effect” for the call for “equal work, equal pay, equal conditions” according to a social partner interviewee.

5. **Classifying employees too low.** Posting companies may pay according to the collective agreements, but wrongly classify their employees as too low in the skills or professional level, as stated by a Chamber of Commerce interviewee. Construction site inspectors are able to find out through observation whether an employee is misclassified. For example, unskilled workers cannot be iron benders or facade builders. Thus, inspectors work a bit like detectives, taking pictures, observing, interpreting and assessing the situation in order to quickly decide the next steps and report to their legal department.
6. **Categorizing employees as part-time.** Employing workers part-time was mainly a vehicle for saving costs as posted workers rarely seek part-time work. The Austrian administrative regulations then required posting companies to show the timesheet for their part-time workers. Increase of paperwork may deter companies from engaging in fraudulent practices, while decreasing paperwork may foster those. As a social partner said: “De-bureaucratization often means more leeway for misuse one has to say. Our observation is that always where one reduces bureaucracy this means more misuses, and in this case, it is the more of bureaucracy necessary to curb the misuse”. A balance between bureaucracy and free movement of services needs to be considered here.
7. **Deregistering employees due to sickness or accident.** Social partners report that certain posting companies may deregister employees if they have an accident or fall sick. There is no easy way to control this, because this concerns a foreign social insurance provider.
8. **Engaging in fake posting.** Postings may be fake sending of workers when in reality they are permanent, and not temporarily employed. Furthermore, there may be shadow companies or letterbox companies, such as those based in Cyprus, which allow third-party nationals or EU workers to work in Austria, although they may never have worked in the sending country.
9. **Appealing fines.** When a process in the trial court at the district administration is completed with a penal order, then the company may hire a legal representative and make a complaint at the higher administrative court. At that level, however, the issue is usually dissected for legal purposes, or “chewed up and trampled on” to a degree that it loses its original meaning, according to the interviewee of the Financial Police. In this cases, appeals and legal procedures are used to undermine enforcement.

In a harsh manner, a Financial Police official voiced that these practices were similar to a lucrative mafia structure: “In principle, it is a mafia structure which has formed, because there is a lot of money in it, which is hard to believe. It is about billions, not millions, it is about billions.” The underlying argument is that if posting is correctly done, posting workers would incur more costs than establishing a branch office in Austria. Therefore, if companies could offer their services at a lower price, they would most likely operate illegally. To stop these practices, a social partner interviewee argued for fines even for formal or “trivial offences” (Kavaliersdelikte) such as not showing documents as possible indicators for illegal practices. However, such fines would need to be in line with CJEU ruling of “Maksimovic and Others”.

One also needs to keep in mind that not only foreign companies may optimize costs, but Austrian companies could save costs by working with subcontractors and temporary work agencies from other countries. Lack of transparency and complexity of subcontracts and temporary work arrangements may hide wage and social dumping (Hofstadler et al, 2016). On the other side, subcontracting and using temporary work agencies may add an additional layer of liability (chain liability) to the Austrian companies. These companies are equally responsible for following rules and obligations, and, therefore, may put pressure on posting companies.

#### 4.3.2 Employer challenges in applying posting rules

According to a union representative, the LSD-BG is generally considered having a “deterrent” effect for dubious actions of posting employers. However, the 2019 CJEU ruling of “Maksimovic and Others” significantly reduced this deterrence, because administrative fines can no longer be cumulative and disproportionately high.

Employer representatives expressed the following challenges in applying posting rules:

1. **More bureaucracy for posting companies than for domestic companies.** Company representatives regarded bureaucracy as by far the most challenging hurdle in posting their employees. With the LSD-BG, Austria put into place a higher level of bureaucracy than the PWD and subsequent European directives would require. For example, the list of documents to be kept at work sites is longer than the PWD requires (see Article 9,1a). There is currently a pending case, to be decided by the CJEU on this. A company representative complained about this long list which would create extra work and seemed “discriminatory” compared to the requirements for Austrian companies. The interviewee expressed the need to work with an Austrian law firm to prepare and update all the required documents and make them available for potential inspection by public authorities. One particular point that adds to bureaucracy is that the ZKO reporting needs to list the exact days an employee is working in Austria. If these days change, the ZKO will need to be adapted, which adds to the bureaucracy and makes flexible customer-oriented work difficult. This is especially true for companies near the Austrian border that frequently have short work orders to fulfil.
2. **Applying the correct collective agreements.** It is difficult for sending companies to familiarize themselves with the Austrian system of collective agreements and to determine the right wage levels for their employees. There may be several different collective agreements that could be applied for a certain activity. It is challenging for the posting companies to find out which levels and positions to apply correctly. Also pay levels usually change each year, so wage documents need to be adapted accordingly. Working with posting lawyers to find and apply the correct collective agreements might add to the company’s costs.
3. **Keeping documents on the work site.** Keeping and providing the right documents has been a challenge to the interviewed companies. It may even be a data protection issue to store personal and sensitive data on work sites, which often are not equipped to do so. Furthermore, some documents even need to be kept on site when a particular worker is not in Austria, for example this is the case when the total construction project period is longer than a worker’s presence. As mentioned above, companies may select to work with law firms who keep these documents for them.

4. **The slow issuance of A1 documents** by the sending country authorities is a challenge for the timely posting of workers in certain origin countries. There were no complaints about the issuance speed for Slovenia, for example. Austria requires an A1 Certificate to be issued once the posted workers arrive in Austria unless there is a replacement certificate. However, countries often do not issue these replacement certificates in a timely fashion. It may take months and, therefore, sometimes posted workers are sent without the A1 permit. For example, getting an A1 in Romania may take three months according to an employer representative. As a social partner representative suggested, national social insurance agencies need incentives to issue the A1 documents faster. There was a complaint to the European Commission about the slow issuance of A1 documents, but the complaint did not have any effect.
5. In cases of posting undertakings and temporary agency work, **domestic companies are also held responsible for temporary work agency's practices**. As "Maksimovic and Others" has shown, the Austrian contractor was also made responsible for the offence, facing millions of Euros of fines. While the fines were considered disproportionate, it still stands that main contractors are responsible for workers from posting undertakings in certain areas such as when hiring non-EU staff.

#### 4.4 Worker Protection

This section of the report focuses on specific issues of worker protection. Posted workers have a higher "risk of exploitation" in several aspects according to a union representative. Due to some of these practices, several public stakeholders and social partners used the term "modern slavery". Firstly, posted workers are usually not informed about their rights and, therefore, are more vulnerable, e.g. they may not know that their rights are being violated. Secondly, posted workers are typically not socially connected in Austria, and thus are more inclined to work long hours, regardless of Austrian regulations. Thirdly, foreign posting companies may not be obliged to have a works council, where workers can bring forward their issues and posted workers cannot join Austrian trade unions immediately, but need to have worked six months in the country (which does not happen most of the time). Fourthly, posted workers might not be aware of other Austrian public authorities, such as the Chamber of Labour where they can bring forth their claims formally.

##### 4.4.1 Mechanisms for worker protection: institutional, social partners

There is a number of mechanisms for worker protection in Austria. The first ones are the **trade unions** who have been able to protect the interests of posted workers to Austria mostly at the policy level. Together with other social partners across Europe, the Austrian Federation of Trade Unions supports the proposal of a **Social Progress Protocol** which would require a review of the Posting of Workers directives and the social protection regulations.<sup>27</sup> This protocol could be amended to any EU treaty to be ratified. The European Trade Union Confederation argues that in the past the fundamental freedom of providing services has been favoured over the social rights. The idea is that fundamental social rights should prevail over conflicting paradigms.

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<sup>27</sup> Such a proposal was already suggested in 2008 by the European Trade Union Confederation (ETUC), responding to the Laval ruling by CJEU where a posting company was not required to provide its workers equal pay to the hosting country. <https://www.etuc.org/en/proposal-social-progress-protocol>, accessed 30 October 2020.



However, in order to become a union member in Austria workers have to have worked for six months in the country, a criterion, which most posted workers cannot meet, because most posting assignments are shorter. In addition, posted workers are often hard to unionize due to their dependence on the employer, lack of information on worker representation in the host country, language barriers and so on (Danaj and Sippola, 2015). There has also been some degree of ambiguity on whether trade unions can represent specific posted workers on their individual or collective claims. As **CJEU** rulings have become more in favour of workers' protection (especially the 2015 CJEU verdict *Sähköalojen ammattiliitto*), while still upholding the freedom to provide services, social partners from receiving countries are allowed to represent posted employees. Hence, we found that the secretaries of the Construction Union ("Gewerkschaftssekretäre") visit construction sites to offer support to posted workers, even when they are not members. However, most of the work done remains in terms of lobbying and information dissemination. For example, they distribute brochures and leaflets in the workers' native languages containing information about their rights.

While posted workers do not have membership in Austrian unions, the Chamber of Labour representative interviewed pointed out that unions may defend posted workers' rights at the national policy level if wage dumping seems to be practised. They would take on exemplary cases, but not necessarily defend workers for individual claims. However, in general it has been difficult to identify and find workers who would be willing to be included in an exemplary case, because individual workers may not directly benefit from the outcome of that case, for example when a posting company filed bankruptcy.

The **Chamber of Labour** is another worker protection mechanism available to posted workers in Austria. As a public institution, the Chamber of Labour by law represents the interests of all people employed in Austria in terms of their economic, social, educational and consumer interests. Differently from the trade unions to which membership is voluntary, the law entitles employees in Austria to be members of the Chamber and, therefore, make use of its protection services. Main issues they have been dealing with are related to labour law, social protection and insolvency. While posted workers are not members per se, they still get legal advice on the matters that pertain to their individual grievances. The Chamber has also been able to provide consultations on Austrian labour law in Hungarian, Slovak and Czech, but these services have been project-based and, therefore, discontinued. Nonetheless, if necessary, translations are still provided in exceptional cases (Gagawczuk, 2019a).

Social partners we interviewed primarily protect workers from Austrian companies, but they also have an interest in protecting posted workers' rights. They were particularly concerned about "equal work, equal pay, equal conditions". Enforcing these principles would not only help posted workers, but also workers from domestic companies. Interviewees from the Chamber of Commerce also expressed the need for ensuring the workers' protection and rights while at the same time guaranteeing the freedom to provide services.

Posted workers with precarious employment conditions may contact the following NGOs:

- **UNDOK** is an information and support office for undocumented workers, but also supports posted workers who may have problems with their employer. Organized by

the trade unions, UNDOK operates a hotline on employment and social matters and in-person counselling in several languages in Vienna.<sup>28</sup>

- **MEN VIA** is an information and support centre for men who are victims of human trafficking including foreign nationals who are exploited or forced to work in dangerous conditions.<sup>29</sup>

These NGOs operate in the most precarious, illegal circumstances foreign national workers may find themselves in. In many cases, posted workers may be faced with situations in the grey zone, which still may operate in the legal realm.

**Social attachés** appear to be a promising practice for protecting posted workers according to a union representative. In a particular case, Romania has established social attachés in their embassies in several cities in Western Europe where Romanian posted workers are stationed. Posted workers can contact them to obtain information about their rights and get support in legal issues. These social attaches foster information exchange and networking in the host country's language.

#### 4.4.2 Challenges to worker protection: access to information, legal support and trade union representation

The single official website for both workers, employers and authorities is the Posting of Workers' Platform.<sup>30</sup> The website is provided in seven languages: German, Czech, English, Hungarian, Polish, Slovak and Slovenian. It provides a one-stop information hub according to the LSD-BG requirements and anticipated practical needs (Murr, 2019). The website also links to supporting institutions where further information can be found.

Representatives of both public authorities and social partners found that challenges to worker protection may result from language barriers and lack of knowledge. Enforcement agencies typically do not have translators on staff, so they rely on somebody from the company who can speak for the workers. Such a person may be a mouthpiece ("Sprachrohr") of the employer, and not necessarily of the workers, a social partner critically remarked.

Stakeholders mentioned challenges to worker protection especially relating to smaller companies and smaller construction sites. Larger companies typically ensure that they are compliant, because they do not want to risk their reputation. But smaller posting projects, for example in smaller construction sites, may not provide the posted workers with the necessary support. They may not have a supervisor or contact person for questions and concerns, and thus may be left to themselves.

If workers feel not fairly treated, they need to know where to go to address their grievances. It may be difficult for them to prove their claim. For the workers need to provide evidence for whom they worked, what type of work they did and for how long. They also would need witnesses. However, there is a lack of transparency regarding employment relationships, especially in the construction business. Workers may not know for example who their employer is, which will complicate any subsequent investigation. Furthermore, a construction site is a temporary situation, which may no longer exist the next day. In one case, the union supported

<sup>28</sup> Anlaufstelle zur gewerkschaftlichen Unterstützung undokumentiert Arbeitender (UNDOK), retrieved December 18, 2020, from <https://undok.at/de/ueber-uns/>.

<sup>29</sup> MEN VIA website, retrieved December 18, 2020, from <http://www.men-center.at/via.html>.

<sup>30</sup> Go to [www.entsendeplattform.at](http://www.entsendeplattform.at), retrieved on January 29, 2021.

posted employees in suing for underpayment of wages. While the court decided in favour of the posted workers, the company had already filed bankruptcy and, therefore, did not pay out the workers. This example shows that there is little incentive for workers to claim their rights and stand up against their employers.

Claiming their rights may be easier if cross-border enforcements would work. A representative of the Chamber of Commerce found that in an ideal world, posting across borders no longer would be needed. Instead, every EU citizen could directly cross borders and work with local companies. However, some workers may prefer temporary labour mobility, so it would be preferred if the posting company and the domestic company would both guarantee that the person's rights are protected by European and Austrian labour and social laws without fiddling the system. For example, ideally the social insurance standards would converge at a European level so that the labour and social standards would be equal across Europe, as a company representative wished for.

## 5 Synthesis and Conclusions

The Austrian case study investigated how the Posting of Workers Directive and other EU regulations interplay with Austrian rules and regulations on social security, health insurance, temporary agency work, and company law. The study identified gaps between procedures (legal basis) and practices (experiences) in posting rule enactments. The study came to the following conclusions:

1. **The Austrian regulatory framework** and especially the Act to Anti-Wage and Social Dumping (LSD-BG) seem comprehensive and sometimes stricter than the European Posting of Workers Directive and its Enforcement, especially with respect to administrative requirements, document keeping, and fines. The labour law is also well covered by the LSD-BG, addressing wage dumping at least in theory. On one side, public officials and social partners applaud the strictness as a means of fighting social fraud, while on the other side, affected posting companies and their representatives see this as an unnecessary, overburdening bureaucracy to engage in the freedom of providing services. Some sought legal battles until the Court of Justice of the European Union (CJEU) overturned the Austrian legislation through the ruling “Maksimovic and Others”. As a result, administrative fines can no longer be cumulative, disproportionate to the violation, and impose prison sentences.

**The Revised PWD and CJEU rulings are in favour of equal pay.** The amended Posting of Workers Directive, which came into force in July 2020, stipulates not just equal pay for minimum wage, but for overall remuneration including additional payments. Furthermore, recent CJEU decisions clarified regulations that daily allowances need to be paid out. While the principle of “equal work, equal pay, equal conditions” is being upheld, it is not yet fully enforced.

2. **The regulatory enforcement** within and across borders was identified as deficient by public stakeholders and social partners. In particular, social insurance regulations are difficult to enforce across borders. Because the origin country is responsible for social insurance, social insurance regulations for foreign posting companies are not covered by Austrian law, with the exception of the BUAK regulations for construction companies. A continuum exists from legal to illegal practices: Some companies may reduce their social insurance costs by paying only minimum wage level of the sending country, or by obtaining insurance documents by only paying for a few days or not at all. Sending and receiving social insurance institutions do not always share their information and cooperate in a timely manner to uncover problematic practices. The Electronic Exchange of Social Security Information is not fully functional yet as of 2020.
3. **Employers** state that if they strictly follow all Austrian rules and regulations, they are faced with added costs: Legal services, document keeping, tax services, housing costs, etc, which is cutting into savings and impedes freedom of services provision. Employers find the Austrian regulations to be overly bureaucratic, surpassing the EU directives and also surpassing the requirements for domestic companies. They, therefore, call for reducing the administrative burden according to minimum EU requirements. Public authorities find that

employers may have an incentive to violate administrative regulations such as document keeping, as those are considered less severe than social fraud and now result in lower fines.

4. **Worker protection** continues to be improved towards “equal work, equal, pay, equal conditions,” following the amended PWD. Language difficulties and limited access to information still remain challenges in supporting posted workers and therefore deserve policy attention and the introduction of new tools.

The findings in Austria portray a complex and strict regulatory system that is supported by well-established enforcement mechanisms and structures. The implementation of the Directive and the subsequent Directives is taken one step further by Austria in an effort to protect national standards and prevent social dumping. These measures seem to go in line with the recent revision of the Directive, which Austria has, nonetheless, not transposed yet. The assumption might be that the Austrian regulatory model could be replicated elsewhere across the EU. However, in practice the latest rulings of the CJEU with regards to ‘Maksimovic and Others’ indicate that at the EU level the protection of the right to provide services in the common European market is at least equally important to the fight against social dumping, if not more important in case the latter hinders the former. Such a tension between the national and the supranational level might have an effect on enforcement, as well. Our research indicates that despite the various human resource limitations, public authorities in Austria are actively enforcing national legislation on posting and the related areas, yet their pursuit of what national legislation considers fraudulent might already be challenged by the involved companies based on ‘Maksimovic and Others’. Challenges to enforcement might thus make it more difficult to detect, prevent and prosecute abuse and by so doing also create additional challenges to workers’ protection. Hence, further regulatory convergence and better transnational enforcement practices would also help fill the cracks in which posted workers might fall during their cross-border labour mobility. At the same time, employer voices indicate that the Austrian system is complicated and burdensome even for complying companies and the differences between the sending and the receiving countries are confusing and costly in the best cases and leading to various irregularities and worker exploitation in the worst. These findings indicate that there is a need for more transparency and clarity in the design and application of the rules, in order to allow companies to conduct their business while they maintain labour standards for posted workers.

## 6 Policy Recommendations

The following recommendations are based on stakeholder suggestions on how to narrow the gaps between legislation and practice in Austria and how to address challenges in enforcing posting regulations. The recommendations are organized by EU level, national level (Austria, enforcement agencies), national level (sending country), social partners, and employers.

<p><b>EU Level</b></p>	<p><b>Strengthen the European Labour Authority.</b> ELA enforcement of administrative law is needed throughout Europe. This is a potentially effective instrument in control and enforcement across borders. National solutions are not sufficient. Therefore, European level regulations and actions are needed.</p>
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	<p><b>Improve the Internal Market Information System.</b> IMI can effectively assist cross-border for administrative cooperation of national, regional and local authorities. IMI should function as an effective tracking mechanism to follow information requests from one authority to another across borders.</p> <p><b>Speed up EESSI implementation.</b> The Electronic Exchange of Social Security Information could be used for facilitating and speeding up the investigation and monitoring processes by social insurance authorities across borders. Currently the verification of A1 documents is difficult and lengthy. EESSI could function as a virtual network in the fight against social dumping.</p> <p><b>Consider European social insurance chip card</b> with real-time registry. Internationally valid, electronic social insurance cards for posted workers would decrease the need for cross-border collaboration on social-insurance related issues.</p> <p><b>Implement Social Progress Protocol.</b> Together with social partners across Europe, the Austrian Federation of Trade Unions supports the proposal of a Social Progress Protocol which would require a review of the Posting of Workers directives and social protection regulations. This protocol could be amended to any EU treaty, so that fundamental social rights would prevail over conflicting paradigms such as freedom of providing services.</p>
<p><b>National level (Austria)</b></p> <p><b>Enforcement State Agencies</b></p>	<p><b>Extend competency of investigation to all relevant agencies.</b> Currently, enforcement agencies are restricted to investigate within a limited area, they find they have only insights into one piece of the overall picture. Therefore, they recommend if agencies could also access information of related areas.</p> <p><b>Adjust the LSD-BG to reflect the amended PWD and court rulings.</b> The LSD-BG was passed before the amended PWD was put into force. Furthermore, CJEU ruling such as “Maksimovic and Others” are not yet reflected.</p> <p><b>Provide a platform to upload documents electronically.</b> Instead of having hard-copy documents on site, a secured online, publicly funded and administered platform could be put in place where companies could upload all the required documents regarding their company and their workers. This would also solve the issue of data protection on work sites.</p> <p><b>Reduce bureaucracy.</b> Two employer representatives recommended that the ZKO notifications could be more flexible by not having to indicate and adjust each day of a worker being posted in Austria, but instead include a period of posting. This would be especially helpful for companies close to the Austrian border who require quick response customer requests.</p> <p><b>Support posting companies in finding the correct collective agreements.</b> The Entsendeplattform (<a href="https://www.entsendeplattform.at">https://www.entsendeplattform.at</a>) is a good start for finding this information, but for many employers it feels still like a jungle to find out which collective agreement to apply. One</p>

	<p>solution could be an online, publicly funded and administered tool where companies could enter the information of an employee such as education, level of experience, certifications, etc. Then the system would calculate the correct wage. This would protect companies from using the wrong wage levels.</p>
	<p><b>Reduce incentives for wage and social dumping.</b> For example, one solution to reduce fraudulent part-time postings in Austria was to require more bureaucratic documentation when posting companies employ workers halftime. For companies, this additional paperwork deterred them from making part-time assignments, which were mainly a vehicle for saving costs. This practice could be applied to other administrative areas as well.</p>
<b>National level (sending countries)</b>	<p><b>Deploy social attachés for posted workers.</b> They could function as point of contact for information and rights, in the national language. Rumania has such attachés in their embassies across Western European countries.</p>
	<p><b>Incentivize national social insurance agencies to issue A1 documents faster.</b> Electronic tools could be explored that would speed up the process, because posting companies could not lose unnecessary time when deploying workers.</p>
<b>Social Partners</b>	<p><b>Continue to offer information in the workers' native languages.</b> Consider translators, test electronic tools which could help with translation of rare languages on work sites.</p>
	<p><b>Offer union membership to posted workers</b> to decrease their risk of exploitation. Special terms may be needed. Ideally, posted workers would organize themselves.</p>
	<p><b>Encourage EU citizens</b> to also consider working for Austrian companies rather than for subcontracting or posting companies. Their equal rights will be more easily enforced as no cross-border issues are involved.</p>
<b>Employers</b>	<p><b>Ensure compliance (posting companies).</b> Posting companies may need to work with accounting and law agencies to be compliant or find other ways to able to follow Austrian regulations, even though these have been considered difficult to follow. Recent and pending CJEU rulings may help streamlining these reporting requirements.</p>
	<p><b>Monitor posting temporary work agencies or companies.</b> Austrian companies are responsible for the bearings of temporary work agencies and posting undertakings in general who are contracted with them. For example, this is true for complying with documentation requirements, BUAK contributions, and collective wage agreements in Austria.</p>

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